BELLSOUTH OPPOSITION

WC DOCKET NO. 02-238

EXHIBIT J

PART 2 OF 5

commercial arbitration, and Supra believes that this method of resolving disputes has proven its worth by providing judicial economy, the ability to award damages, due deference to the precedence of our orders, and the speedy and efficient resolution of disputes. BellSouth, however, views commercial arbitration as costly, time consuming, and impractical, and a process which may lead to decisions inconsistent with our orders.

The parties' current agreement requires that commercially arbitrated issues be resolved within 90 days of a complaint being raised. Supra compares the time consumed in its commercial arbitration, with the time it takes for us to resolve the issues raised in a complaint. We note, however, that in Supra's commercial arbitration, it was necessary for the parties to waive the 90-day requirement for the resolution of the disputed issues. Once waived, the commercial arbitration is open-ended, with resolution being determined by the complexity of the issues, the procedural motions raised by the parties, and the parties continued efforts to reach agreement on the issues outside the confines of the tribunal. Complaints brought before us are influenced by the same factors, and these are often the greatest determinants of the duration of a proceeding.

We also note that neither party quantified the issue of cost to any great extent. Proceedings before either a commercial arbitration panel or before us would follow many of the same steps in that parties would be faced with the costs of discovery, providing witnesses, attorneys' fees, etc. The prevailing party in a commercial arbitration may be able to recoup its expenses from the losing party, if the parties' contract provides for such. Supra believes that this is as it should be, and Florida taxpayers money should not be used to finance parties' noncompliance with an agreement approved by the PSC.

However, as noted at the hearing, the regulatory assessment fees paid by the regulated utilities pay the salaries of our personnel. Therefore, it is the general body of the ratepayers of both Supra and BellSouth that pay for the litigation before us. Thus, the record indicates that it is equally likely that the ratepayers of both parties would bear the costs of either commercial arbitration or dispute resolution proceedings brought to us.

BellSouth is particularly concerned with the consistency in our approved agreements. It believes that we are clearly more capable to handle disputes between telecommunications carriers

than are commercial arbitrators. Supra believes, however, that once the initial agreement is approved, the enforcement of the agreement itself should be left in the hands of commercial arbitrators who can deal with this in a commercial way.

As previously noted, on January 30, 2002, Supra filed a Motion for Leave to File Supplemental Authority. Supra sought to bring to our attention the 11th Circuit's decision in, Cir. Order Nos. 00-12809 and 00-12810, the consolidated appeals of BellSouth Telecommunications, inc. v. MCIMetro Access Transmission Services, Inc., D.C. Docket No. 99-00248-CV-JOF-1 and BellSouth Telecommunications, Inc. V. WorldCom Technologies, Inc. And E.spire Communications, Inc., Docket No. 99-00249-CV-JOF-1, respectively (MCIMetro). By Order No. PSC-02-0159-PCO-TP, issued February 1, 2002, the Motion was granted. Pursuant to Order No. PSC-02-0202-PCO-TP, BellSouth and Supra filed briefs on the impact of the 11th Circuit Court's decision in MCIMetro on Issue 1 of this Docket. The parties agree that MCIMetro clearly holds that the Telecommunications Act of 1996 does not authorize state commissions to interpret or enforce the terms of an interconnection agreement. Where they diverge is in their interpretation of MCIMetro's effect on our authority to resolve disputes arising under an interconnection agreement, pursuant to Florida state law.

Supra maintains that Florida law is silent with respect to whether we have the authority to adjudicate a dispute involving an interconnection agreement that has already been approved by us. It believes the 11th Circuit has clearly stated that a state commission cannot glean such authority from general provisions such as Section 364.01, Florida Statutes, which focuses on our regulatory role.

BellSouth, to the contrary, argues that Section 364.162, Florida Statutes, does indeed grant us express authority to interpret and enforce interconnection agreements between ILECs and ALECs. BellSouth proffers Section 364.162(1), Florida Statutes, which provides:

> Whether set by negotiation or by the commission, interconnection and resale prices, rates, terms, and conditions shall be filed with the commission before their effective date. The commission shall have the authority to arbitrate any dispute regarding interpretation of interconnection or resale prices and terms and conditions.

We do not agree with Supra's contention that the 11th Circuit's decision in MCIMetro is controlling at this time as applied to this issue. However, even if it is, we believe there is sufficient authority in state law for us to act.

Under the Act it is clear that parties have the ability to arrive at interconnection agreements either through negotiation or through arbitration before this Commission, as in the instant docket. Thereafter, we must approve such agreements accordance with Section 252(e) of the Act. Once approved, however, the 11th Circuit's MCIMetro decision is clear that state commissions are not authorized by the Act to resolve complaints arising out of that agreement, but may only do so pursuant to a grant of authority under state law. While the 11th Circuit Court found the Georgia Commission lacked an express grant of authority in Georgia statutes, the 11th Circuit has not made such a determination regarding Florida state law. Were the U.S. District Court for the Northern District of Florida given an opportunity for such consideration, we believe that the Court would find such authority for our jurisdiction in the language of Section 364.162(1), Florida Statutes, which expressly confers upon us the authority "to arbitrate any dispute regarding interpretation of interconnection or resale prices and terms and conditions." Moreover, we believe the authority to resolve such disputes is clearly an assignment of quasi-judicial authority by the state legislature, a factor the 11th Circuit also found lacking in Georgia. Section 364.162, Florida Statutes does not limit or otherwise distinguish between our authority to resolve (1) disputes arising out of the initial establishment of an interconnection or resale agreement and (2) disputes arising out of previously approved agreements. Thus, the Florida Legislature apparently intended the action in this area to be within our jurisdiction.[8]

Supra also asserts that part of having the power to adjudicate a dispute is the power to enforce the findings at the conclusion of the hearing. We note that enforcement of agency action may be had by means other than seeking relief in court. In the case of telecommunications companies, we are authorized to fine any company that has "refused to comply or to have willfully violated any lawful rule or order," in accordance with Section 364.285, Florida Statutes. In that it allows penalties for refusal to comply, it is clearly a method of "enforcement."

Furthermore, we emphasize that Section 364.015, Florida Statutes, upon which Supra relies for the proposition that we cannot enforce our Orders, was developed to provide us with an avenue to address matters pertaining to the health, safety, and welfare of the public. The intent was to outline the means by which we can seek injunctive relief in court. It does not, however, lend any support to Supra's argument that we cannot enforce our Orders, because as set forth herein, we clearly have that authority, albeit by means other than issuance of injunctions. Thus, inability to enforce our decisions through injunctions does not serve as a basis for finding we are not authorized to resolve interconnection disputes.

Although both parties set forth persuasive arguments, we believe that consistent with our finding in Order No. PSC-01-1402-FOF-TP, we will not here prescribe that the parties enter into a provision outside the scope of the Act, and for which they have not duly bargained. Therefore, the parties shall not be required to utilize commercial arbitration as a method for resolving disputes arising out of their new interconnection agreement. The appropriate forum for the resolution of such disputes is before us. Within the final arbitrated agreement submitted to us for approval the parties may either include a negotiated provision addressing this issue, or no provision at all.

C. Filing of Agreement for Non-Certificated ALECs

Here we consider whether the Interconnection Agreement should contain language to the effect that it will not be filed with this Commission for approval prior to an ALEC obtaining certification.

1. Arguments

BellSouth witness Cox adopted the prefiled direct testimony of witness Ruscilli. Witness Cox argues that because any ALEC, whether certificated or not, may adopt this agreement, we should require any adopting entity to be certificated prior to the filing of the agreement for our approval. In support of this position, witness Cox quotes from a letter dated April 25, 2000, from Walter D'Haeseleer, Director of our former Division of Telecommunications, to Nancy Sims of BellSouth: "BellSouth's caution in deciding to hold filing for non-certificated entities until they obtain certification is appropriate." Furthermore,

witness Cox wonders why Supra has taken this position because it is a fully certificated ALEC in the state of Florida.

Supra witness Ramos claims BellSouth requests that an ALEC be certificated prior to submitting an adopted agreement for approval in order to delay entry of new carriers in its service territory. Witness Ramos claims that we only mandate that an ALEC be certificated before it begins providing telecommunications services in Florida. The witness quotes Rule 25-4.004, Florida Administrative Code, as stating:

> Except as provided in Chapter 364 of the Florida Statutes, no person shall begin the construction or operation of telephone lines, plant or systems or extension thereof, or acquire ownership or control thereof, either directly or indirectly, without first obtaining from the Florida Public Service Commission, a certificate that the present or future public convenience and necessity require or will require such construction, operation or acquisition.

Witness Ramos claims non-certificated ALECs have the right to conduct test operations in Florida so long as they do not sell telecommunications services to consumers, and this right is consistent with Section 364.33, Florida Statutes. There are no laws or decisions that support BellSouth's position, according to witness Ramos. Witness Ramos states BellSouth's fear that a non-certificated ALEC will adopt an agreement and illegally provide telecommunications service to the public is unjustified. He points out that the agreement will require certification before service is provided and that the indemnification provisions contained in the follow-up agreement are more than adequate to address BellSouth's concerns regarding liability for service provided by a non-certificated entity.

2. Decision

Rule 25-4.004, Florida Administrative Code, in pertinent part provides :

> Except as provided in Chapter 364 of the Florida Statutes, no person shall begin the construction or operation of telephone lines, plant or systems or extension thereof, or acquire ownership or control thereof, either directly or indirectly, without first obtaining from the Florida Public Service Commission, a certificate that the present or future public

> convenience and necessity require or will require such construction, operation or acquisition.

While Supra believes this rule only requires certification for entities providing telecommunications services to the public, we note this specific rule is not applicable to ALECs, but the underlying statute, Section 364.33, Florida Statutes, contains substantially similar language and is applicable to all carriers.

Section 364.33, Florida Statutes, provides:

> A person may not begin construction or operation of any telecommunications facility, or any extension thereof for the purpose of providing telecommunications services to the public, or acquire ownership or control thereof, in whatever manner, including the acquisition, transfer, or assignment of majority organizational control or controlling stock ownership, without prior approval. This section does not require approval by the commission prior to the construction, operation, or extension of a facility by a certified company within its certificated area nor in any way limit the commission's ability to review the prudency of such construction programs for ratemaking as provided under this chapter.

While the statute does note that the acquisition, construction, and operation must be for the "purpose of providing telecommunication services to the public" it also is clear that entities may not even begin such activities with that purpose in mind before obtaining certification.

While we acknowledge that requiring ALECs to be certificated before they can conduct test operations under an adopted agreement may slow competitors from entering the local phone market as Supra has alleged, we believe that this approach is in the best interests of Florida consumers because it ensures that only certificated companies can provide telecommunications services to the public. Therefore, the final arbitrated agreement submitted to us for approval shall include language that it will not be filed with us for approval prior to an ALEC obtaining the appropriate certification from us. BellSouth shall hold adopted agreements from being submitted to us for approval until such time as the adopting ALEC obtains certification.

D. Customer Service Records Downloads

This issue considers whether BellSouth should be required to provide Supra with a download of its CSRs and whether such a download would violate the Customer Proprietary Network Information (CPNI) rights outlined in § 222 of the Act.

1. Arguments

BellSouth witness Pate contends that allowing Supra to download all CSRs would violate BellSouth's duty under the Act not to disclose CPNI without the permission of the individual user. Witness Pate states that downloading CSRs would "constitute a breach of confidentiality and privacy for which Supra is not entitled." BellSouth offers both electronic and manual access to BellSouth's CSRs as a pre-ordering functionality and therefore a download is not necessary, according to witness Pate. He asserts that this electronic pre-ordering functionality is available to ALECs through Local Exchange Navigation System (LENS), and Telecommunications Access Gateway (TAG). Pre-ordering functionality, says witness Pate, is also available through RoboTAG, which offers real-time access to BellSouth's CSRs. Witness Pate describes the steps an ALEC has to take to access CSRs through BellSouth's LENS system. These steps include: 1) Signing a blanket letter of authorization (LOA) which states that an ALEC will obtain permission before accessing that end-user's CSRs; 2) logging onto LENS and selecting the "Inquiry Mode" and selecting the "view customer record option"; 3) having an employee populate the phone number and location where a customer resides; and 4) having an employee select the "proceed with inquiry" prompt and click ok, when prompted by the computer to answer, "are you authorized to view this CSR?"

BellSouth witness Pate contends that the 1996 Act and the FCC only require BellSouth to provide nondiscriminatory access to OSS, not identical access or interfaces as Supra has suggested. Witness Pate asserts the FCC has defined nondiscriminatory access as access to OSS that allows ALECs to perform the functions of pre-ordering, ordering and provisioning for resale services in substantially the same time and manner as BellSouth does for itself. In the case of unbundled network elements, the FCC requires that the OSS provide an efficient competitor with a meaningful opportunity to compete, according to witness Pate. Witness Pate asserts that BellSouth's OSS, which ALECs use to access CSRs, meets the requirements of both the Act and the FCC. In support of this conclusion, witness Pate submitted an exhibit of computer records showing LENS and TAG have unscheduled

downtimes of less than 1 percent.

Supra witnesses Ramos and Zejinilovic contend that BellSouth's OSS systems for ALECs to access CSRs are subject to frequent outages and are inadequate. Witness Zejinilovic submitted an exhibit showing numerous outages of BellSouth's systems. Witness Zejinilovic asserts that these crashes were often accompanied with TAG error messages.

Witness Ramos contends that a download of CSRs would provide the best solution to BellSouth's chronically down OSS. A download of CSRs would put Supra at true parity with BellSouth and that is what is required by the Act, according to witness Ramos. Witness Ramos claims that "[w]ithout true parity in OSS, no competition can develop in the local exchange market." He claims downloading CSRs would not violate the Act because Supra would sign a blanket LOA agreeing that Supra would only access CSRs for those customers who have given permission. Supra witness Ramos claims this is not much different from the current system where Supra representatives are allowed to view any CSR as long as they certify they have the customer's permission and enter certain information from the customer as required by FPSC rules such as their social security number, date of birth, driver's license number, and mother's maiden name. Witness Ramos states if given permission to download CSRs, Supra representatives would only view CSRs for which they had permission; the only difference is that Supra representatives would be able to view CSRs even when BellSouth's systems are down.

2. Decision

Customer proprietary network information (CPNI) is addressed in Section 222 of the Telecommunications Act, which states:

> Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information shall only use, disclose, or permit access to individually identifiable customer propriety network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.

47 U.S.C. §222(c)(1)[9] (emphasis added) The Telecommunications

Act of 1996, in pertinent part, defines "Customer Proprietary Network Information" as: "(a) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier solely by virtue of the carrier-customer relationship." 47 U.S.C. §222(f)(1)(A). Supra does not contest BellSouth's assertions that CSRs constitute CPNI and that CSRs contain exactly the type of sensitive, individually identifiable information described within the Act's definition. Therefore, the sole remaining issue related to §222 is whether a download of the records by Supra would constitute access or disclosure for which individual customer permission is required.

Witness Ramos asserts individual customer permission is not required to download CSRs because Supra would be willing to sign a blanket LOA agreeing to view only the CSRs for which they have permission. However, we believe that such a practice is not permissible under the Act. Downloading the CSRs would necessarily involve physical possession of those records by Supra, and this would constitute disclosure within the meaning of 47 U.S.C. § 222(c)(1). In such a case, the Act requires individual customer permission. The Act does not allow downloads of CSRs even though Supra promises to view only those CSRs for which it has permission, because Supra would still possess CSRs of customers who have not consented.

The Act specifically provides that CPNI can be accessed or disclosed without customer permission only to carriers "in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories." 47 U.S.C. § 222(c)(1) Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent. See TRW, Inc. v. Andrews, 2001 U.S. Lexis 10306 (2001)(citations omitted). The download Supra proposes does not fall within these carefully tailored exceptions, because Supra will be able to download CSRs

---

[9]For a similar statute predicated on Florida State law, see §364.24(2), Florida Statutes. §364.24(2), Florida Statutes, provides in pertinent part: "Any officer or person in the employ of any telecommunications company shall not intentionally disclose customer account records except as authorized by the customer or as necessary for billing purposes, or required by subpoena, court order, other process of the court, or otherwise by law."

for customers for which it will not be providing service. We decline to create an additional exception to Congress' detailed listing of when CPNI can be used without customer permission, based on Supra's generalized notions of parity.

While downloading of CSRs has not been addressed explicitly by the FCC, the FCC in its Second Report and Order (CC Docket Nos. 96-115, 96-149) issued February 26, 1998, with regard to CPNI stated:

> In contrast to other provisions of the 1996 Act that seek to open all telecommunications markets to competition, and mandate competitive access to facilities and services, the CPNI regulations in section 222 are largely consumer protection provisions that establish restrictions on carrier use and disclosure of personal customer information. Congress expressly directs a balance of both competitive and consumer privacy interests with respect to CPNI. Congress' new balance, and privacy concern, are evidenced by the comprehensive statutory design, which expressly recognizes the duty of all carriers to protect customer information and embodies the principle that customers must be able to control information they view as sensitive and personal from use, disclosure, and access by carriers.

FCC 98-27 ¶ 1. Again, a download of CSRs would be in clear violation of §222 of the Act and the FCC's above statement.

Though in this instance Supra is requesting a remedy that cannot be granted, we believe Supra has expressed legitimate concerns regarding BellSouth's OSS for accessing CSRs. The testimony of Supra witnesses Ramos and Zejinilovic indicates that BellSouth's system is subject to frequent crashes and downtime, and they produced a detailed recording of each such crash. BellSouth, on the other hand, claims a downtime of only 1%, yet admits that this only accounts for outages of twenty minutes or more. Should these problems continue, Supra would be well advised to file a complaint with us or avail itself of other appropriate dispute resolution to address system downtime.

Nevertheless, the final arbitrated agreement submitted to us for approval shall not require BellSouth to allow Supra to download all CSRs. This would be contrary to the Telecommunication Act's prohibitions against unauthorized access

or disclosure of Customer Proprietary Network Information (CPNI).

E. Rate for a Loop Utilizing DAML Equipment

In this section, we address BellSouth's unbundled loop rate and whether that rate should be discounted when BellSouth provides loops to Supra via Digitally Added Main Line (DAML) equipment. Supra also asks that BellSouth be required to notify Supra periodically when DAML equipment is deployed.

1. Arguments

BellSouth witness Cox believes that we should affirm the rates for unbundled loops that we have recently been approved. She maintains that these rates are appropriate for those instances where DAML equipment is used. The witness states:

> The use of DAML equipment is a means to meet a request for service in a timely manner. It is not generally a more economic means of meeting demand on a broad basis than using individual loop pairs. Supra apparently believes that a loop utilizing DAML equipment should be offered at a lower cost than other loops. However, cost for unbundled loops have been calculated in compliance with Federal Communications Commission rules on a forward-looking basis without regard to the manner in which the customer is served (e.g., copper or digital loop carrier).

Witness Cox asserts that DAMLs are perfectly acceptable items of network equipment or BellSouth would not employ them for its customers. She concedes that use of DAML equipment has resulted in substandard modem performance, but contends that BellSouth has a solution that the company implements whenever a complaint is logged. BellSouth witness Kephart states:

> It is true that the original Terayon DAML COT cards applied to some loops (all copper or integrated SLC96 circuits in particular) resulted in decreases in modem performance and risk for customer dissatisfaction and complaints. However, BellSouth has worked with Terayon to support a new card that will not produce a significant impairment to the

> signal. This card has undergone final testing and is currently being deployed in BellSouth.

Witness Kephart also emphasizes that BellSouth's loop costs are not based on actual cost, but on TELRIC cost, which is based on a forward-looking network design. Additionally, witness Kephart testifies:

> BellSouth deploys DAML equipment on a very limited basis to expand a single loop to derive additional digital channels, each of which may be used to provide voice grade service. The deployment is limited to those situations where loop facilities are not currently available for the additional voice grade loops(s). DAML systems are generally not an economical long-term facility relief alternative except possibly in slow growth areas.

As to notifying Supra when DAML is deployed, witness Kephart asserts that the current loop provisioning process is sufficient. During his cross-examination he stated, "In order to determine a loop's makeup, a CLEC who has access to a particular system, inputs a telephone number or circuit ID and gets back information about the cabling pair or pairs that serve the address location in question."

As previously noted, Supra believes that DAML is a line-sharing technology. When line-sharing technology is involved in the UNE environment, Supra contends it should only be obligated to pay the prorated cost of the shared network elements. Supra witness Nilson states:

> BellSouth should be enjoined from deploying this technology on ALEC subscriber circuits. The potential for abuse and "bad acts" is just too high, because it is an anti-competitive tool for ILECs. Should an agreement be reached to deploy such equipment on specific ALEC lines, the ALEC should not be charged for two loops, when it is in fact utilizing just one, or in some cases, just half a loop.

Supra witness Nilson believes that DAML lines are less expensive and more technologically problematic than copper lines. He argues that this increases Supra's support cost. Therefore, witness Nilson claims that the rate for a UNE loop should be discounted when DAML equipment is used. Witness Nilson goes on to say:

> DAML served loops do not provide all the features, capabilities and functions of a copper loop. DAML electronics have higher failure rates than bare copper, high speed DSL services cannot be provisioned over customer lines served by DAML.

In its brief, Supra contends that, "BellSouth is being unduly enriched by providing 2:1, 4:1, 6:1, and even 8:1 DAML lines while charging Supra the full cost for each access line." Supra witness Nilson believes that BellSouth should only be allowed to charge Supra the relative portion or fraction of the 1:1 copper line (enhanced by the deployment of DAML equipment) Supra uses to provide service to its customer(s). According to Supra, it is "not equitable" for it to pay "full cost" for a line that previously served one customer, but is now capable of serving 2, 4, 6, or even 8 customers with the use of DAML equipment.

Supra witness Nilson believes that BellSouth should be required to periodically disclose the use of such equipment if we do not prohibit BellSouth from deploying DAML equipment on ALEC subscribed circuits. Currently, BellSouth does not notify Supra when the technology has been deployed to a Supra customer, which Supra witness Nilson believes increases its troubleshooting cost. This cost increase is due to increased call volumes handled by Supra customer service representatives(CSRs) and the cost to identify and correct the problem, both caused by a lack of notification/authorization prior to a BellSouth action.

2. Decision

It appears that the situations in which DAML equipment is actually deployed are minuscule, according to Hearing Exhibit 17, a proprietary document in this proceeding. Because the question of what is the appropriate disclosure method when DAML equipment is deployed is addressed by the parties in their testimony, we recognize the issue as having been broadened to include notification/authorization. On numerous occasions in his

testimony, Supra witness Nilson contends that BellSouth converts Supra customer lines to DAML with no prior warning to Supra. Though given the opportunity to rebut these allegations made by Supra witness Nilson, BellSouth witness Kephart's only response was that "the deployment(of DAML equipment) is limited to those situations where loop facilities are not currently available for the additional voice grade loop(s)" and "it is not BellSouth policy to utilize DAML equipment on CLEC customers in order to free up a loop for a BellSouth customer." Further, in his cross examination, BellSouth witness Kephart states that BellSouth does not currently have a process for "informing CLECs of the type of plant that we use to serve their customers." Therefore, it appears that there may be situations in which BellSouth does switch Supra end users from a standard copper loop to a loop supported by DAML equipment without notifying Supra. In cases where BellSouth makes changes to one of Supra's existing loops that may adversely affect a Supra end user, it is reasonable to require BellSouth to provide prior notification. Under cross examination BellSouth witness Kephart infers that there are "few cases" when a BellSouth engineer may resort to DAMLs. As such, notifying Supra will not be an overly burdensome task for BellSouth to complete.

There are two questions that must be answered in order to arrive at a decision on the remaining issue. First, is the use of DAML equipment an appropriate alternative for BellSouth to provide timely service to its customers and second, should loop rates be discounted when DAML is utilized? Although Supra witness Nilson contends that BellSouth uses DAML "to provide additional loops where they have run out of loops" and as an "anti-competitive tool," there is credence to BellSouth witness Cox's statement that the use of DAML equipment is a means to meet a request for service in a timely manner. BellSouth deploys DAML equipment on a very limited basis, primarily to expand a single loop to derive additional channels, each of which may be used to provide voice grade service. The deployment is limited to those situations where loop facilities are not currently available for additional voice grade loops. DAML systems do not appear to be an economical long-term facility relief alternative, except possibly in slow growth areas.

Although BellSouth witness Cox argues that DAMLs are perfectly acceptable items of network equipment, she concedes that use of DAML lines can result in substandard modem performance. Supra witness Nilson claims that "DAML served loops do not provide all the features, capabilities and functions of a

copper loop. DAML electronics have higher failure rates than bare copper, high speed DSL services cannot be provisioned over customer lines served by DAML." In response, BellSouth witness Kephart states that BellSouth has worked with Terayon to support a new card that will not result in a significant impairment to the signal. This card has undergone final testing and is currently being deployed by BellSouth whenever a complaint is logged. We believe that Supra and its end users will have fewer complaints if BellSouth provides Supra information in advance when Supra customer lines are switched to DAML-supported lines.

Supra witness Nilson claims that BellSouth should only be allowed to charge Supra the relative portion or fraction of the copper line (enhanced by the deployment of DAML equipment) Supra uses to provide service to its customers. The argument of Supra witness Nilson fails to consider that the price of BellSouth's UNE loops are not based on actual cost, but on a forward-looking, most efficient network design without regard to the manner in which the customer is actually served today (e.g., copper or digital loop carrier). According to BellSouth witnesses Cox and Kephart, the current BellSouth loop rates are those approved in Docket No. 990649-TP. In this proceeding we accepted the use of the BellSouth Loop Model (BSTLM) to yield loop costs. The BSTLM incorporates what is often referred to as the "scorched node" assumption (Order No. PSC-01-1181-FOF-TP, p. 120), as required by 47 CFR Section 51.505(b)(1):

> The total element long-run incremental cost of an element should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers.

Under a scorched node analysis, total demand is to be met instantaneously using the least-cost, most efficient technology, constrained only by the location of existing wire centers. Consequently, the network facilities design is optimally sized to meet all demand, and a technology such as DAML would not be deployed; in fact, the BSTLM does not use this technology. Accordingly, since BellSouth's UNE loop rates are based on a least-cost technology, instead of DAML, it would not be appropriate to further discount them.

Based on these facts, it is clear that our approved rates

for unbundled loops are appropriate and do not require any adjustment to recognize the use of DAML equipment. DAML equipment serves an intended purpose in the timely provisioning of service to end users.

Therefore, the final arbitrated agreement submitted to us for approval shall not reflect a reduced rate for a loop when the loop utilizes DAML equipment. The agreement shall reflect that when changes are to be made to an existing Supra loop that may adversely affect the end user, BellSouth should provide Supra with prior notification.

F. Withholding Payment of Disputed and Undisputed Charges/Disconnection

Herein, we consider the parties' abilities to withhold payment during the pendency of a billing dispute and whether the adversely affected party can disconnect the other one for such nonpayment. These issues address similar problems and involve substantial overlapping testimony. It is, therefore, appropriate to address these issues together.

1. Arguments

BellSouth witness Cox asserts both parties should pay undisputed charges regardless of the amount of charges one party disputes from another. In regard to billing disputes, witness Cox states:

> BellSouth must be able to deny service in order to obtain payment for services rendered and/or prevent additional past due charges from accruing. It would not be a reasonable business practice for BellSouth to operate "on faith" that an ALEC will pay its bills. Indeed, a business could not remain viable if it were obligated to continue providing services to customers who refuse to pay lawful charges.

Witness Cox points out that BellSouth is seeking to compel the parties only to pay undisputed amounts. ALECs would have little incentive to pay their bills without the threat of disconnection for nonpayment, according to witness Cox. Allowing one party to withhold payment of all charges, not just those that are in dispute, would enable that party to "game" the billing system to delay paying bills. In support of this, BellSouth, refers to the testimony of Supra witness Ramos on cross-examination, where he

states that Supra has not paid BellSouth for two years.

In addition, witness Cox claims BellSouth's position is consistent with our recent decision in the BellSouth/WorldCom arbitration proceeding in Docket No. 000649-TP. Witness Cox quotes us as finding that:

> BellSouth is within its rights to deny service to customers that fail to pay undisputed amounts within reasonable time frames. Therefore, absent a good faith billing dispute, if payment of account is not received in the applicable time frame, BellSouth shall be permitted to disconnect service to WorldCom for nonpayment.

Order No. PSC-01-0824-FOF-TP at pp. 155-156. As well as being consistent with our prior orders, witness Cox claims disconnection for nonpayment is the same policy BellSouth applies to its retail customers.

Finally, witness Cox requests that we consider that the terms and conditions of any agreement it reaches with one ALEC are subject to being adopted by another ALEC. She contends that the FCC's Rule 51.809 requires BellSouth, subject to certain conditions, to allow requesting ALECs to adopt agreements approved by us. Therefore, our decision in this matter has the possibility to govern more than just BellSouth's and Supra's relations. Witness Cox suggests the simple way to resolve this issue is for Supra to pay undisputed amounts within the applicable time frames, and this portion of the agreement will never become an issue.

Supra witness Ramos adopted the prefiled direct and rebuttal testimony of Supra witness Bentley. Witness Ramos argues that either party should be allowed to offset disputed charges. By offsetting, witness Ramos refers to the practice of withholding payment of undisputed charges in an amount equal to any charges disputed by the billing party during the pendency of a dispute. Offsetting is justified, according to witness Ramos, because the current interconnection agreement covers a business relationship whereby both parties bill and collect from each other, and therefore the billing, payment, collection and dispute processes must take into consideration all aspects of the billing process. He contends that we will benefit from reviewing billing, payment, and collections disputes as a whole, rather than on a piecemeal basis.

Witness Ramos cites BellSouth v. ITC Deltacom, 190 F.R.D. 693 (M.D. Ala., 1999) as illustrative of the dangers of viewing billing disputes piecemeal. In ITC DeltaCom, ITC DeltaCom, an ALEC, alleged BellSouth owed it reciprocal compensation for ISP-bound traffic and that it was not able to offset the monies owed against charges from BellSouth. Witness Ramos claims that while ITC Deltacom was able to prevail in the courts after several years of litigation, that was not before facing possible bankruptcy as a result of having to pay BellSouth its bills.

Since BellSouth has deeper pockets and significantly more resources, witness Ramos believes BellSouth is in a position to threaten Supra with a service disconnection during a billing dispute, absent contractual protection. Witness Ramos states that it is possible for BellSouth to force Supra to make payments to BellSouth, while BellSouth withholds Supra's monies, thereby draining Supra of its financial resources during the pendency of protracted litigation. Witness Ramos alleges that BellSouth should not be allowed to disconnect Supra because Supra cannot similarly threaten BellSouth, a former monopoly provider on which Supra must now rely.

Moreover, witness Ramos maintains it is never appropriate for BellSouth to disconnect service to Supra or Supra's customers at BellSouth's discretion. Such a remedy may only be used as one of last resort, to be granted by an impartial third party such as this Commission, a panel of arbitrators, or a judge. He contends that if an ALEC's lines are disconnected for more than a few minutes or hours, it could potentially be out of business permanently. Witness Ramos believes this looming and potential threat of disconnection is not good for Florida consumers. The citizens of Florida should not have to worry that their services may be disconnected because their carrier and BellSouth may be engaged in a billing dispute, according to witness Ramos.

Witness Ramos alleges that BellSouth's proposed language on this issue allows BellSouth to act first, then to defend its actions later. He states that the moment BellSouth denies Supra's billing disputes, BellSouth considers the amount no longer in dispute and begins steps to initiate disconnection. Witness Ramos alleges that BellSouth has disconnected Supra without carrying out the required dispute resolution steps outlined in the parties' current agreement. More specifically, witness Ramos refers to May 16, 2000, when BellSouth allegedly disconnected Supra's access to ALEC OSS, and LENS, thereby

substantially impairing Supra's ability to provide service its customers. This disconnection lasted three days and nearly put Supra out of business, according to witness Ramos.

While Supra's own tariff permits it to disconnect retail customers for nonpayment, witness Ramos believes this is not relevant to the BellSouth/Supra relationship. He contends this is because consumers throughout the state, rather than just one individual, would be unfairly affected if BellSouth were to wrongly disconnect Supra.

2. Decision

Supra witness Ramos alleges that BellSouth uses the threat of disconnection to force Supra to pay charges from BellSouth, all the while unreasonably disputing bills rendered by Supra. To make up for this alleged inequity, witness Ramos proposes that the interconnection agreement allow Supra to withhold paying BellSouth an amount equal to the charges from Supra which BellSouth chooses to dispute (offsetting) and require BellSouth to pursue dispute resolution before disconnecting Supra. However, we believe Supra's proposed remedies would provide little incentive for Supra to pay its bills and that other adequate remedies exist based on the record.

We agree with BellSouth witness Cox that "offsetting" could give ALECs too much of an incentive to delay paying legitimate charges. We also acknowledge Supra witness Ramos' concession that Supra has not paid BellSouth since January of 2000. We believe an ILEC's ability to receive timely payment for undisputed charges is important. We recognized as much when addressing the BellSouth/WorldCom arbitration, in Docket No. 000649, where we stated:

> BellSouth must be able to deny service in order to obtain payment for services rendered and/or prevent additional past due charges from accruing. It would not be a reasonable business practice for BellSouth to operate "on faith" that an ALEC will pay its bills. Indeed, a business could not remain viable if it were obligated to continue providing services to customers who refuse to pay lawful charges.

Order No. PSC-01-0824-FOF-TP at p. 162. Offsetting may also unduly confuse litigation by artificially switching the party seeking relief. Such actions would increase the amount of time

required for dispute resolution, and would not be in the interest of ALECs, ILECs and, more importantly, Florida consumers.

Supra does not allow its retail customers to offset charges, nor does it require dispute resolution before disconnection of retail customers for nonpayment. We have found a company's policies towards its retail customers relevant when considering appropriate billing terms in the past. See Order No. PSC-01-0824-FOF-TP at p. 162. Supra's treatment of its retail customers provides additional justification for allowing BellSouth to disconnect Supra for nonpayment. Supra argues how it treats its retail customers should not be relevant because only one person could be affected unfairly in a billing dispute between a customer and Supra while a multitude of customers could be affected by a dispute between Supra and BellSouth. We disagree with Supra's claim that its billing practices toward retail customers are not relevant, because Supra's own practices directly contradict its claim that offsetting is a widely accepted business practice. Supra's treatment of its retail customers is yet another factor that supports requiring both parties to pay undisputed charges and not allow offsetting.

However, while we disagree with Supra about the relevance of its billing practices towards retail customers, we do agree that the effects of the billing disputes are likely to be different. More specifically, a billing dispute between BellSouth and Supra has the potential to unfairly affect customers throughout the state while a dispute with an individual customer does not. Disconnection could likely have devastating business consequences for Supra. This should serve as a significant incentive for Supra to avoid disconnection by paying legitimately undisputed bills. If BellSouth threatens Supra with disconnection for nonpayment of a bill Supra believes it has legitimate grounds to dispute, Supra may petition us to stay the disconnection on an interim basis. If BellSouth unreasonably threatens Supra with disconnection for nonpayment, we will take appropriate remedial actions to make sure such conduct does not recur.

Furthermore, we believe Supra has a meaningful remedy if BellSouth were to unfairly withhold payment of charges from Supra. If BellSouth were to dispute charges from Supra in bad faith, Supra may file a complaint with us. While Supra may suffer financial hardship during a dispute where Supra ultimately prevails and yet we find BellSouth had a good faith belief to dispute charges, this is the same cost that BellSouth must bear when Supra exercises the same right under the same circumstances.

We find that Supra's proposed payment terms would provide little incentive for Supra to pay its bills and that other adequate remedies exist for billing disputes. Therefore, the final arbitrated agreement submitted to us for approval shall indicate that both parties are allowed to withhold payment of charges disputed in good faith during the pendency of the dispute. Neither party is allowed to withhold payment of undisputed charges. BellSouth shall be permitted to disconnect Supra for nonpayment of undisputed charges.

G. InterLATA Transport

In this section we address whether BellSouth should be required to provide interoffice transport, via UNEs leased to Supra, when that transport crosses LATA boundaries. The dispute as framed apparently to hinges on the parties' differing interpretations of Section 271(a) of the 1996 Act which specifically states:

> GENERAL LIMITATION - Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA service except as provided within this section.

1. Arguments

BellSouth witness Cox contends that Section 271 of the Act prohibits BellSouth or any of its affiliates from providing interLATA facilities or services to Supra or any other carrier prior to receiving authorization from the FCC. She explains that the only interLATA services BellSouth is authorized to provide without FCC approval are out-of-region services and incidental services, neither of which applies to the DS1 interoffice transport requested by Supra.

Supra witness Nilson argues that Section 271 of the Act does not prohibit Supra from providing interLATA services as it does BellSouth. As such, witness Nilson believes that Supra should be allowed to provide interLATA services through the use of UNEs. Witness Nilson's claim is based upon his interpretation of Section 271(a) of the Act in which he argues that although BellSouth is itself precluded from providing services to its end users across LATA boundaries, it is not specifically precluded from "wholesaling such services to other carriers." He states that "the intent of the Act is clearly explained to give a CLEC

access to local, intraLATA and interLATA interoffice facilities." (Emphasis in original) Moreover, witness Nilson reasons that interoffice transport is a UNE and that a CLEC's right to unbundled interoffice transport has been fully upheld. Accordingly, once that UNE is leased to Supra, Supra assumes exclusive rights to the use of that element. Thus, Supra, as a facilities-based provider, would be deemed as providing the transport across LATA boundaries, not BellSouth. Witness Nilson further propounds that "(B)ellSouth's only role would be providing wholesale elements to a carrier, not prohibited retail service to an end-user."

Witness Nilson maintains that this interpretation is consistent with FCC Order 96-325, ¶449, which states in part:

> ...the ability of a new entrant to obtain unbundled access to incumbent LECs' interoffice facilities, including those facilities that carry interLATA traffic, is essential to that competitor's ability to provide competing telephone service.

Further, 47 C.F.R. § 51.309(b) specifies:

> (b) telecommunications carrier purchasing access to an unbundled network element may use such network element to provide exchange access services to itself in order to provide interexchange services to subscribers.

Additionally, witness Nilson explains that the FCC in FCC Order 96-325 at ¶356, concluded that Section §251(c)(3) permits all telecommunications carriers, including interexchange carriers, to purchase UNEs for the purpose of offering exchange access services or to provide exchange access services to themselves in order to provide interexchange services to consumers. Further, he states:

> In ¶440, the FCC concluded that ILECs must provide interoffice facilities between central offices, not limit facilities to which such interoffice facilities are connected, allow a competitor (ALEC) to use an interoffice facility to connect to an ILEC's switch, provide unbundled access to shared transmission facilities between end offices and the tandem switch, as well as transmission capabilities such as DS1.

Therefore, in witness Nilson's view, "BellSouth's refusal to provide Supra with interoffice transport, is a refusal to provide Supra with the Services and Elements contained in the Agreement and required by the FCC's First Report and Order, ¶¶342 to 365."

BellSouth witness Cox acknowledges that the interoffice transport requested by Supra is a UNE. However, she maintains that BellSouth is still prohibited from providing this transport across LATA boundaries. Moreover, witness Cox states, "[S]ection 271(a) of the Act provides no qualification of the nature of the service, whether retail or wholesale, in the phrase 'interLATA services'."

Both parties appear to agree that the DS1 interoffice transport that Supra requests is an unbundled network element (UNE). However, the parties disagree as to whether BellSouth is obligated to provide interoffice transport between BellSouth central offices, across LATA boundaries.

BellSouth witness Cox maintains that BellSouth is prohibited, pursuant to Section 271(a), from providing interLATA services to any carrier. On the other hand, Supra witness Nilson goes to great length to argue that the Act's intent is to give CLECs access to the incumbent's local, intraLATA and interLATA interoffice facilities. Supra contends that its request for interLATA interoffice transport is consistent with the Act and the FCC's First Report and Order, which states that "the ability of a new entrant to obtain unbundled access to incumbent LECs' interoffice facilities, including those facilities that carry interLATA traffic, is essential to that competitor's ability to provide competing telephone service."

2. Decision

DS1 interoffice transport is an unbundled network element that the incumbent is obligated to provide. However we are not persuaded that Supra's request for BellSouth to provide interoffice transport across LATA boundaries is consistent with Section 271 of the Act. In particular, we disagree with witness Nilson's argument that if DS1 interoffice transport were leased from BellSouth by Supra (as a facilities-based carrier) via UNEs, and provided across LATA boundaries, that Supra would be deemed as providing the interLATA service. We do agree with witness Cox's argument that BellSouth would still be providing interLATA transport to Supra, and hence an "interLATA service."

Furthermore, we are not convinced that BellSouth "terribly confuses its prohibition from offering interLATA services directly to end users, and leasing network facilities to another carrier." We do not share Supra's interpretation of BellSouth's obligations under Section 271(a) with regard to providing "interLATA services." Specifically, the Telecommunications Act of 1996 defines "interLATA services" in the following manner:

> InterLATA service: The term "interLATA service" means telecommunications between a point located in a local access and transport area and a point located outside such area.

Thus, no qualification of services, whether retail service to end users or wholesale service to other carriers, is provided for in the phrase "interLATA services." While the record supports BellSouth's position in the instant case, this issue may warrant further investigation. It is unclear as to whether or not the Telecommunications Act's definition of "telecommunications" differentiates between service to an end-user and service provided to a carrier. Nonetheless, based on the record, the plain language of Section 271(a) specifically precludes BellSouth from providing interLATA services to any carrier and, consequently, there is no basis for requiring BellSouth to provide interoffice transport to Supra across LATA boundaries.

Therefore, the final arbitrated agreement submitted to us for approval shall not require BellSouth to provide transport to Supra Telecom if that transport crosses LATA boundaries.

H. Performance Measures

Herein, we determine which performance measures shall be included in the parties' Interconnection Agreement.

1. Arguments

BellSouth witness Cox asserts that this issue should not be addressed in the current proceeding. Witness Cox believes that our generic Performance Measurements docket, Docket No. 000121-TP, addresses the very issues raised by Supra. As such, witness Cox contends that:

> [t]his generic docket is the appropriate vehicle for collaborating on the performance measures appropriate to the ALEC industry in Florida. Performance measures should not be decided in individual ALEC arbitration proceedings. Since all ALECs in Florida, including Supra, had the opportunity to participate in this docket, this Commission should require Supra to abide by the Commission's decision in the generic performance measurement docket.

In support of this assertion, witness Cox offers several issues from that docket that relate to Supra's concerns:

> Issues from Docket No. 000121-TP that pertain to measurements:
>
> Issue 1.a: What are the appropriate service quality measures to be reported by BellSouth?
>
> Issue 1.b: What are the appropriate business rules, exclusions, calculations, and levels of disaggregation and performance standards for each measurement?

Supra witness Ramos, however, contends that "Supra wants to have a clear performance measurement included in the parties' agreement." In an effort to increase clarity, effectiveness, and parity, witness Ramos states:

> Supra proposes the establishment of Performance Measures for pre-ordering, ordering, provisioning, billing, maintenance, systems performance and quality of service provided. As a rule, all measures should be a comparison of like activities between the ILEC and ALEC.

In addition, "Supra further proposes that the Performance Measures should include standard and/or targeted achievement levels." He also asserts that:

> Supra's past experience with BellSouth on this matter is that BellSouth consistently and repeatedly acts in bad faith. The SQMs that are part of the parties' existing Agreement and the Interim Performance Metrics proposed by BellSouth are inadequate. At first glance, the metrics proposed seem quite extensive, however upon more thorough examination it is apparent that BellSouth has no intention of measuring the metrics that have the most bearing on ALECs.

In addressing our generic docket and BellSouth's assertions, Supra witness Ramos states that "Supra is unwilling to waive its rights by agreeing now, to comply with some unknown outcome of ongoing or future proceedings concerning Performance Measurements." Supra argues that many of the pre-ordering and ordering performance measures Supra is requesting would be unnecessary if BellSouth would simply provide direct access to its OSS. Furthermore, witness Ramos asserts "that the performance measurements should include standards and/or targeted achievement levels." He goes on to state that "to go through the exercise of measuring and reporting if there is no attempt to reach parity or agreed upon standards" would be pointless. In lieu of the generic docket's performance measurements, witness Ramos proposes nineteen performance measures that would apparently address Supra's concerns. Those measures would compare the performance of BellSouth's retail operations to BellSouth's performance when handling Supra's orders. Supra also requests that the related measurement reports be e-mailed to Supra on a monthly basis.

2. Decision

When addressing which performance measurements should be included in the agreement, Supra witness Ramos, adopting the testimony of Carol Bentley, asserts that performance measurements "are of an utmost concern to Supra." He goes on to state, "the fact that these dockets and/or proceedings are pending provides further weight to the importance of Performance Measurements." We do not dispute the importance of performance measurements and reiterate that:

> [p]erformance monitoring is necessary to ensure that

> ILECs are meeting their obligation to provide unbundled access, interconnection and resale to ALECs in a nondiscriminatory manner. Additionally, it establishes a standard against which ALECs and this Commission can measure performance over time to detect and correct any degradation of service provided to ALECs.

Order No. PSC-01-1819-FOF-TP, p.7. The measurement categories proposed by Supra are similar to those contained in our Order, which states:

> [t]he major measurement categories are preordering, ordering, provisioning, maintenance and repair, and billing. In addition, the following categories are also included: operator service and directory assistance, database information, E911, trunk group performance, collocation, and change management.

Order No. PSC-01-1819-FOF-TP, p.9.

Based on the record, Supra apparently did not review the metrics established in the generic docket, issued September 10, 2001, to determine whether the metrics specified therein satisfied any of Supra's demands.

The generic Performance Measurements Docket was designed "to develop permanent performance metrics for the ongoing evaluation of operational support systems (OSS). . . ." and includes a monitoring and enforcement program to eliminate concerns over nondiscriminatory access to the ILEC's OSS. See Order No. PSC-01-1819-FOF-TP, p.7. That order also specifies that the measurement reports be posted to BellSouth's website by a specified due date. See Order No. PSC-01-1819-FOF-TP, p.130. Although the end results may differ somewhat from Supra's proposal, the conclusions reached in the generic docket adequately address Supra's concerns.

The generic Performance Measurements docket, Docket No. 000121-TP, established the appropriate performance measurements applicable to BellSouth. The resulting measurements, as approved by the FPSC in Order No. PSC-01-1819-FOF-TP, and BellSouth's forthcoming performance assessment plan, will apply to BellSouth only. BellSouth must abide by them and as such, we do not believe that it is necessary to specifically include those performance measurement metrics in the parties' interconnection agreement, although the parties may choose to do so.

I. Refusal to Provide Service

Here we consider the conditions under which BellSouth can refuse to provide services to Supra under the parties' interconnection agreement. Specifically, the dispute centers around whether or not BellSouth should be required to provide services to Supra when those services are not identified in the interconnection agreement.

1. Arguments

BellSouth witness Cox testifies that her company's position is that in order to incorporate new or different terms, conditions or rates into the parties' agreement, an amendment must be executed. She explains that "[W]hen an ALEC notifies BellSouth that it wishes to add something to or modify something in its Agreement, BellSouth negotiates an Amendment with that ALEC if the agreement has not expired." According to witness Cox, this is not only BellSouth's policy, but the Act requires that BellSouth and ALECs operate under filed and approved interconnection agreements.

Witness Cox believes that BellSouth's position, with regard to requiring amendments to agreements, is also supported by Order No. PSC-01-1181-FOF-TP, p. 473, issued May 25, 2001, in Docket No. 990649-TP, wherein we state:

> Therefore, upon consideration, we find that it is appropriate for the rates to become effective when the interconnection agreements are amended to reflect the approved UNE rates and the amended agreement is approved by us.

According to witness Cox, except in specific instances where we order otherwise (such as the Order in Docket 990649-TP), the Amendment becomes effective when it is signed by both parties, and thereby acts as BellSouth's authority to effectuate any required billing changes.

Moreover, witness Cox believes that given our order in Docket No. 990649-TP, "there will never be a case where BellSouth provides a service to Supra that is not part of its Interconnection Agreement." She further argues that not to include all of the services that BellSouth provides to Supra in its interconnection agreement, as Supra requests, circumvents the

"pick and choose" opportunity of other ALECs. In addition she states, "if BellSouth did provide services to Supra not covered by the agreement, there would be no language to turn to in cases of a dispute over what was provided or how it was provided."

Supra witness Ramos argues that under the terms of an interconnection agreement, BellSouth should not, under any circumstance, refuse to provide any service requested by Supra, regardless of whether or not the service is addressed in the parties' agreement. He states that "such services should be provided at the time of the request and that for new items, elements or service [sic], upon Supra's acceptance of a relevant and reasonable cost study, the prices should be applied retroactively." Witness Ramos likens this scenario to that of the concept of "true-ups" as applied to ALECs seeking to collocate equipment in BellSouth central offices.

In his testimony, witness Ramos affirms that the Follow-On Agreement should be a substantially complete agreement, "subject only to amendments negotiated by the parties or mandated by law and regulatory authorities," and that Supra would do its best to identify all services and elements for which no rate has been established. However, he believes that to the extent that some rates are left out or not determined at the time the agreement is executed, Supra's request is reasonable, and "would be in the best interests of Florida's consumers, as they would not have to wait for the parties to arbitrate additional rates before being provided with a competitive service." He further explains the procedure by which services should be provisioned when those services are not identified in the Agreement prior to execution:

> If a rate is not provided in the Follow-On Agreement for a service, item or element, and that service, item or element could not reasonably be identified prior to execution (of the Follow-On Agreement), then BellSouth must provide that service, item or element without any additional compensation. This includes components of any service, item or element for which there are cost studies or for which it can be reasonably concluded that BellSouth is compensated for the component within the cost of the entire service, item or element.
>
> If the Follow-On Agreement does not directly address a service, item or element, but that service, item or element is necessary to provide a service, item or element directly addressed by the Follow-On Agreement,

> then BellSouth must provide that service, item or element without additional compensation if cost studies show or one could reasonable [sic] conclude that the cost of the service, item or element not addressed is included in the cost of the service, item or element addressed in the Follow-On Agreement.
>
> Finally, if the Follow-On Agreement does not address a new service, item or element and new contract terms are necessary, then BellSouth must still provide that service, item or element; but, if the parties cannot expediently negotiate a new amendment, and must proceed according to the dispute resolution process in the Follow-On Agreement to resolve the terms of the new amendment [sic]. However, absent a Commission order, BellSouth should not be able to refuse to provide the service, item or element while the parties are resolving the new amendment. The new amendment should be applied retroactively to the date the service is first provisioned.

Witness Ramos believes that language must be included in the agreement to provide an incentive for BellSouth to provision services requested by Supra. Moreover, he contends that the need for language providing incentive for ILEC compliance is evidenced in FCC Order 01-204 in Docket No. 98-147. Witness Ramos states:

> With respect to collocation issues, the FCC affirmatively stated that "[they] recognize that an incumbent LEC has powerful incentives that, left unchecked, may influence it to allocate space in a manner inconsistent with [its] duty." Id. at paragraph 92, and, "...incumbents also have incentives to overstate security concerns so as to limit physical collocation arrangements and discourage competition." Id. at paragraph 102. This language properly reflects the FCC's conclusions that ILECs require incentives in order to ensure compliance with the Act."

Witness Ramos further alleges that BellSouth seeks to use the amendment process as a tactic to hinder and delay provisioning of services which Supra requests under the agreement. He believes that BellSouth's position that the "Amendment will become effective when signed by both parties" allows BellSouth to "put off the adoption of more favorable terms until the longest date possible." In his testimony, he explains the basis for his allegations:

> (U)nder the parties' various agreements, BellSouth would often refuse to provide Supra with requested services, claiming that the agreements did not provide for a certain rate, and therefore, until the parties agreed to a rate or the parties reached an arbitrated rate, BellSouth would continue to deny the requested services.

Further, with respect to Supra's attempts to adopt the "comparative advertising" provision contained in the Mpower Interconnection Agreement, witness Ramos testifies:

> Although Supra requested the right to adopt that provision via correspondence dated October 6, 2000 (Supra Exhibit OAR 41), BellSouth has never responded, and has instead chosen to ignore Supra's request. (Emphasis in original)

In response to BellSouth witness Cox's testimony that an amendment must be executed in order to incorporate new or different terms, conditions or rates into the parties' agreement, witness Ramos retorts that any time Supra would request an amendment to the current agreement, BellSouth insisted that before it (BellSouth) could agree to the amendment, Supra would have to delete an entire Attachment. According to witness Ramos, the most recent example of this practice was evidenced in Supra's request to amend the parties' agreement to incorporate rates pursuant to Order No. PSC-01-1181-FOF-TP, in Docket 990649-TP. Witness Ramos recounts:

> On July 12, 2001, I spoke with Mr. Greg Follensbee, BellSouth's lead negotiator who told me that "BellSouth objects strongly to Supra's amendment request" and "promised to send a formal response explaining BellSouth's objections." See Supra Exhibit OAR 76, letter dated July 23, 2001 to Mr. Follensbee. Mr. Follensbee replied to my letters dated July 11 and 23, 2001 via his misdated letter dated July 19, 2001. See attached Supra Exhibit OAR 77, In his response, Mr. Follensbee stated that:
>
> > In order to provide those rates, it will be necessary to replace the existing attachment 2 with a new attachment 2 that incorporates the terms and conditions that coincide with the new rates. (Emphasis in original)

Consequently, witness Ramos maintains that if BellSouth's position is accepted, then BellSouth would have no incentive to provide services requested by Supra, and could "delay executing an amendment indefinitely."

2. Decision

Supra witness Ramos makes several allegations involving what he believes to be BellSouth's use of its amendment process to delay and hinder the provisioning of services which Supra requests under the interconnection agreement or seeks to adopt under its right to "pick and choose" more favorable terms. He strongly believes that the language of the follow-on agreement must provide an incentive for BellSouth to comply with the terms of the agreement with respect to amending the agreement and provisioning services requested by Supra. BellSouth did not respond in the record to any of the allegations made by Supra.

Although outside the record evidence of this issue, we note that, post-hearing, the Parties have agreed to BellSouth's proposed language with respect to Supra's adoption of rates, terms and conditions found in other agreements pursuant to 47 U.S.C.§ 252. The agreed upon language requires the parties to amend the current agreement within 30 days of Supra's request, or in the event of a dispute, within 30 days of any determination made through the Dispute Resolution Process as set forth in the agreement. This language appears to be responsive to Supra's concern in this regard.

In any event, the fundamental issue is whether or not BellSouth is legally bound by terms and conditions not specifically expressed or stated in the parties' interconnection agreement. Supra witness Ramos acknowledges that "the Follow-On Agreement should be a substantially complete agreement, subject only to amendments negotiated by the parties or mandated by law and regulatory authorities." At the same time, however, he contends that to the extent rates are left out or not identified at the time the agreement is implemented, BellSouth should provide those services at the time of request and then negotiate the amendment, applying the negotiated rates retroactively.

We are not persuaded by Supra witness Ramos' argument. Section 252 of the Act lays out the process by which parties are to negotiate interconnection agreements which govern the parties' relationship. In particular Section 252(a)(1) states in part:

> Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. **The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement.** The agreement...shall be submitted to the State commission under subsection (e) of this section. (Emphasis added)

Further, Section 252(e)(1) states:

> **Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission.** A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies. (Emphasis added)

As such, we concur with BellSouth witness Cox that the 1996 federal Telecom Act requires BellSouth and ALECs to operate under approved interconnection agreements. Further, requiring amendments to agreements in order to effect changes or additions is consistent with Order No. PSC-01-1181-FOF-TP, in Docket No. 990649-TP, in which we found it to be "appropriate for the rates to become effective when the interconnection agreements are amended to reflect the approved UNE rates and the amended agreement is approved by us."

Moreover, as stated by both parties, ALECs are entitled to "pick and choose" more favorable terms from other interconnection agreements. To provide services to Supra when those services are not identified in the parties' interconnection agreement, circumvents the "pick and choose" entitlement due other ALECs, and constitutes a discriminatory practice. Witness Cox presents a valid argument that "if BellSouth did provide services to Supra not covered by the agreement, there would be no language to turn to in case of a dispute over what was provided or how it was provided." Given the parties' prior relationship and apparent inability to negotiate the most straightforward terms and conditions of the previous agreement(s), we believe that it is imperative that the rates, terms and conditions governing the

parties' contractual relationship in the Follow-On Agreement be clearly and unambiguously defined.

In conclusion, we find the record does not reflect that BellSouth is legally obligated to provide services not agreed to in the parties' interconnection agreement without executing an amendment. Thus we find no basis upon which we should compel such a requirement. Given the evidence presented in the record of this proceeding, BellSouth shall not be required to provision services for which rates, terms and conditions are not identified in the interconnection agreement, prior to negotiating and executing an amendment.

J. Rates

Originally, we were asked to consider what rates are appropriate for the following services, items, or elements to be set forth in the Interconnection Agreement: (A) Resale, (B) Network Elements, (C) Interconnection, (D) Collocation, (E) LNP/INP, (F) Billing Records, and (G) Other. Subsequent to the hearing, both sides settled on rates for (A)Resale and (D) Collocation rates. Accordingly, the rates addressed here are: (B) Network Elements, (C) Interconnection, (E) LNP/INP, (F) Billing Records, and (G) Other.

1. Arguments

BellSouth witness Cox adopted the direct testimony of BellSouth witness Ruscilli. Witness Cox believes that the rates we set in Docket No. 990649-TP and Docket No. 000649-TP (specifically for line-sharing) should be incorporated into the Agreement. For those rates not addressed in these dockets, the witness believes that BellSouth's tariffed rates should be incorporated into the Agreement. For line-sharing, witness Cox proposes that "the rates this Commission established in the MCI arbitration decisions [sic] be incorporated into Supra's Agreement."

Supra, on the other hand, proffered what apparently amounts to at least two different positions. First, in his direct testimony, Supra witness Ramos states the rates should be those set forth in the parties' current agreement. However, in his rebuttal testimony, witness Ramos states the parties should negotiate the rates for such items. In its post-hearing brief, Supra attempted to clarify this issue. Supra witness Ramos believes that the rates in the "follow-on agreement" should be

those rates we established in recent or prior proceedings. In particular, the Florida generic UNE Docket, No. 990649-TP, provides Supra and all other ALECs with rates for most of the network elements identified in this issue. In its brief, Supra further adds that it wishes to opt into the terms and conditions associated with line sharing contained in the MCI/BellSouth agreement which we approved in Docket No. 000649-TP. However, Supra contends all interim rates, until made permanent by us, should be subject to true-up. Accordingly, for the network elements where the generic UNE Docket did not establish a rate, Supra seeks to use BellSouth's proposed rates from the SGAT in BellSouth's 271 filing in Docket N0. 960786A-TL as interim rates.

2. Decision

Based on the testimony and post-hearing briefs of the parties it appears that BellSouth and Supra actually have similar views on the rates in this issue. The only exception is the rates which Supra wishes to designate as interim rates subject to true-up. This issue has been substantially narrowed to include the network elements for which we have established rates, and the network elements for which rates have not been established. Since the parties appear to agree on a majority of the "items" in this issue we believe that the rates we established in Docket Nos. 990649-TP and 000649-TP are the appropriate rates for (B) Network Elements, (C) Interconnection, (E) LNP/INP, (F) Billing Records[10], and (G) Other[11].

With regard to those elements for which rates have not been previously been established, we find that the rates proposed by BellSouth are reasonable. As suggested by BellSouth witness Cox, for those elements not addressed in the aforementioned dockets, BellSouth's tariffed rates should be incorporated into the agreement. Supra witness Ramos suggested that the rates for the unaddressed elements should be taken from an expired agreement, but also argued that the parties should negotiate the rates for such items. Due to the apparently conflicting testimony, we are unsure what specific items are being referenced and are,

---

[10] Although there is no discussion as to specific billing records, we presume the items intended to be addressed are Access Daily Usage File (ADUF), Optional Daily Usage File (ODUF), and Enhanced Optional Daily Usage File, for which we have established rates in Docket No. 990649-TP.

[11] Although there is no discussion as to a specific "other" network element(s) by either party, we presume the item intended to be addressed is line-sharing, for which we established rates in Docket No. 000649-TP.